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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GAYNOR-STAFFORD INDUSTRIES, INC.,
Plaintiff-Petitioner,

vs.

WATER POLLUTION CONTROL AUTHORITY OF
THE TOWN OF STAFFORD AND THE
TOWN OF STAFFORD,
Defendants-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an industrial cost recovery plan which selectively asserts a special benefits assessment against some, but not all users of a municipal sewage facility is in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

2. Whether basing such assessment on cost alone and not on increase in value or benefit to users constitutes a "taking" in violation of the Fifth and Fourteenth Amendments' prohibition against taking without compensation.

3. Whether participation of an interested party in formulating the method of assessment results in a denial of due process because of the lack of an impartial decision making process.

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OPINIONS BELOW

The opinion of the Supreme Court of Connecticut (Appendix A, *infra*) is reported in 192 Conn. 638, 474 A.2d 752 (1984). The Opinion of the Superior Court of Connecticut (Appendix B, *infra*) was not reported.

JURISDICTION

The Judgment of the Court below (Appendix A, *infra*,) was entered on April 10, 1984. Reargument was denied on May 30, 1984 (Appendix C, *infra*,). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War on public danger; nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, United States Constitution, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Statute under which Respondents made the special benefits assessment against Petitioners was CONN. GEN. STAT. §7-249, which is reproduced in full as Appendix D, *infra*.

STATEMENT OF THE CASE

A. Proceedings Below

This action was commenced on June 25, 1980, as an appeal under CONN. GEN. STAT. §7-250, from a special benefits assessment levied against Petitioner and three other industrial users of the Stafford, Connecticut municipal sewerage system by Respondents. Petitioner claimed at the trial court that: (1) the assessment was not applied equally to all those similarly situated in violation of the Fourteenth Amendment; (2) the assessment was based upon costs and not increase in value to Petitioner's property in violation of the Fifth and Fourteenth Amendments; (3) the assessment was made on the consideration of information on Petitioner's estimated sewerage flows made several years prior to the actual assessment and (4) Petitioner was not provided with due process in that one of the members of the Respondent Water Pollution Control Authority (the "Authority") had a pecuniary interest in the method the Authority chose to assess benefited properties in the Town. Petitioner also raised several state law issues which were resolved by the Supreme Court of Connecticut and are not now before this Court.

On November 22, 1982, the Superior Court of Connecticut entered final judgment, dismissing Petitioner's appeal. (See Appendix B, *infra*). On December 10, 1982, Petitioner filed an appeal to the Supreme Court of Connecticut, claiming the same constitutional infirmities of the assessment. The court upheld the assessment on all grounds relevant here. (*See* Appendix A, *infra*). On April 23, 1984, Petitioner filed a Motion to Reargue which was denied on May 30, 1984. This Petition followed.

B. **Factual Background**

Petitioner is the owner of real property in the Borough of Stafford Springs, Town of Stafford, Connecticut. The buildings on the property were used for the printing, dyeing, sales and storage of synthetic fabrics. The printing facility discontinued all operations in August 1980, culminating a gradual decline in production which began around 1976. Since August 1980, the property has been for sale and much of the necessary machinery for printing and dyeing has been sold.

In June 1967, Respondent Town was ordered by the State to develop a pollution abatement system for the Willimantic River. At the time, among the several industries contributing to the pollution of the river was Petitioner. The Respondent Town designed a sewerage facility (the "System") based on 1968 estimated flow rates and projections. In 1970, the Town applied for state and federal grant funds to construct the system. A federal grant under the Water Pollution Control Act of 1948, as amended, 33 U.S.C. §466 *et seq.*, was obtained in September 1970. The System was completed and placed in operation in December 1974.

Sometime in 1979, the Respondent Town was informed that it would lose certain federal monies under the grant if it did not institute an "industrial cost recovery" ("ICR") plan. Pursuant to the then existing requirement of the 1948 Act, the Town was required to implement a procedure for cost recovery of the Respondent Town's share of the System's construction and operating expenses. *See* 18 C.F.R. §601.34(c) (35 Fed. Reg. 128) (1970).

Respondent did not attempt to recover its share of the construction costs until 1980; more than twelve years after the System was designed and more than six years after the System went into operation. In 1980, Respondent Authority's consultant prepared an ICR plan that calculated the Town's share of construction expenses and the expense share of the Town's four largest industrial users of the System based on the 1968 flow rate estimates. Based on the 1968

estimates, these industries as a whole comprised 60% of the System's capacity. Petitioner was calculated to comprise 45% of the System's capacity.

The basis for the ICR plan was solely construction costs. At no time prior to the assessment did the Respondents attempt to determine the special benefit to the properties assessed. The ICR plan was the only basis upon which Repondents made their assessment decision.

On June 3, 1980, Respondent Authority approved the assessment following a public hearing. A member of the Respondent Authority at the time of the assessment, William L. Sorenson, had a substantial pecuniary interest in the benefits assessment, in that he had a large interest in one of the other assessed industries. Mr. Sorenson participated at the June 3 public hearing and voted in favor of the Assessment. Had the Respondent Authority used 1980 figures to allocate costs, Mr. Sorenson's firm would have borne a greater percentage of the cost burden than it was actually assessed.

ARGUMENT

A. All property benefited by the sewerage system must be assessed.

It is a basic constitutional principle that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1970). As applied to benefits assessments, this means that all properties benefited by the construction of the public works project must be assessed on the same basis. McQuillan, *Law of Municipal Corporations*, §38.05. *See generally, Stepan Chemical Co. v. Wilmington*, 8 Mass. App. Ct. 880, 391 N.E.2d 1247 (1979); *Carlson-Lang Realty Co. v. Windom*, 307 Minn. 368, 369, 240 N.W.2d 517, 519 (1976); *South Trail Fire Control District v. State*, 273 So.2d 380 (Fla. 1973); *See also, Quality Homes, Inc. v. New Brighton*, 289 Minn. 274, 183 N.W.2d 555 (1971); Antieau, *The Special Assessments of Municipal Corporations*, 35 Marquette L.Rev. 315, 329 (1952).

The assessment before this Court was made on the four largest potential industrial users of the System based on 1968 figures. This completely ignored the existence of many more users and potential users of the System, including at least two other industries presently using it. Further, there are numerous other business and residential properties connected to the System at the present time whose loads the plant was designed to handle. Respondents do not contest the fact that the System was designed to handle effluent from many residences, industries and businesses. However, only four industries were assessed. This scheme flies in the face of the constitutional requirement that municipalities treat all benefited properties alike.

The rationale for requiring equal treatment is evident in this case. It puts a brake on arbitrary and capricious decision making by town officials and requires all who benefit from a public works project to pay their fair share. The Supreme Court of Connecticut stated that choosing to assess only the large industrial users of the system was appropriate, citing a decision which held it was appropriate for a

town to conclude that all properties within a radius of 500 feet were benefited by the construction of a parking lot. 192 Conn. 638, 646 (Appendix A, *infra*, p. A-7). This rationale is flawed in that here there is no question that all properties in the Respondent Town benefited from the System. It was only because of administrative ease and the attempt to fulfill a federal requirement that the Respondent Authority chose to assess only four of the benefited properties. The conclusion of the Supreme Court of Connecticut is not consistent with either logic or the constitutional requirements of equal protection.

B. **The Assessment was based solely on costs and not on benefits to the property.**

The Fifth Amendment to the Constitution of the United States, as applied to the states by the Fourteenth Amendment, prohibits the taking of private property without just compensation. This fundamental principle of American constitutional law is the basis for procedures which municipalities must use in determining special benefits assessments for the funding of public works projects.

In *Norwood v. Baker*, 172 U.S. 269 (1898), the Court, in an opinion by Justice Harlan, set aside an assessment that was based on *costs* of construction alone. The Court stated that while legislatures have considerable power to determine how to make benefits assessments, such assessments must be made on the basis of actual benefits to the property assessed.

In *Gast Realty & Investment Co. v. Schneider Granite Co.*, 240 U.S. 55 (1916), Justice Holmes, writing for a unanimous Court, struck down an ordinance requiring assessment of street construction costs without regard to benefit to the property assessed. The *Gast* Court held that any law that requires an assessment based on cost without regard to benefit is a violation of the Fourteenth Amendment's prohibition against taking without compensation.

Every other jurisdiction which has addressed this issue has held that the assessment may not be based on costs of construction alone. *See, e.g., Chicago & N.W. Ry. Co. v.*

Seward, 166 Neb. 123, 129-30, 88 N.W. 2d 175, 180 (1958); *Watkins v. Zweitusch*, 47 Wisc. 513, 514-15, 3 N.W. 35, 36 (1879); *Snell Isle Homes, Inc. v. St. Petersburg*, 199 So. 2d 525, 527 (Fla. Dist. Ct. App. 1967). *See also, Vaill v. Sewer Commission*, 168 Conn. 514, 517-18, 362 A.2d 885, 888 (1975); McQuillan, *Law of Municipal Corporations*, §38.03.

In this case, it is clear that the *only* basis for the ICR assessment was construction costs. As the foregoing discussion of the applicable law indicates, an assessment made on this basis alone is unconstitutional on its face. Therefore, the conclusion of the Supreme Court of Connecticut that the Repondent Authority "adopted a reasonable method for assessing special benefits" is in error.[1]

C. Petitioner was denied the right to an impartial decision making process by Respondent Authority.

The Court below correctly pointed out that public officials must not place themselves in a conflict of interest of public and private duties. 192 Conn. at 638. (Appendix A, *infra*, p. A-8). This principle is based upon the due process requirement of impartiality by administrative officers. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). *See generally*, K. Davis, *Administrative Law Text* §19.6 (1980). The Court below, however, erred when it concluded that Mr. Sorenson's interest in another industrial user of the System did not taint the assessment process. 192 Conn. at 651. (Appendix A, *infra* , p. A-12).

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[1] The Supreme Court of Connecticut also determined that in fact the assessment did not exceed the benefit. 192 Conn. at 638 (Appendix A, *infra*, p. A-8). This conclusion is also necessarily in error since the trial court based its evaluation of the benefit conferred on Petitioner's property on an appraisal report which itself was based upon the ICR plan evaluation, a complete tautology. Therefore, if the method of assessment fails, so too must the conclusion of the court below on this issue. Further, because the assessment was grounded in 1968 estimated flows and the appraisal was also based on these numbers, the appraisal was not based properly on the state of facts at time that the assessment was made; 1980. At that time the use of the property had changed drastically, as did its sewerage flows.

The Court below failed to consider that if the Repondent Authority had based the assessment in issue on 1980 flow rates, rather than 1968 flows, the assessment against Mr. Sorenson's firm would have increased because the denominator in the assessment formula (total estimated 1968 flows) would have been reduced reflecting the fact that Petition was contributing no waste to the System at the time of the assessment. Therefore, there was a logical alternative to the ICR plan assessment adopted by the Repondent Authority. That alternative would have worked to Mr. Sorenson's detriment. As such, due process requires that he should have abstained from participation in the assessment process. Having participated, Mr. Sorenson tainted the process making it invalid and repugnant to the Fourteenth Amendment requirement of due process.

CONCLUSION

For the foregoing reasons, it is submitted that this case presents issues of sufficient importance to require a review by this Court of the method and procedure by which Petitioner was assessed a special benefits assessment by Respondents. It is respectfully submitted that the Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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GAYNOR-STAFFORD INDUSTRIES, INC. *v.*
WATER POLLUTION CONTROL AUTHORITY
OF THE
TOWN OF STAFFORD ET AL.
(11850)

SHEA, J. The plaintiff, Gaynor-Stafford Industries, Inc., pursuant to General Statutes §7-250,[1] appealed to the Superior Court from a benefit assessment levied on its property by the defendant,[2] the Stafford Water Pollution Control Authority (hereinafter WPCA). The trial court upheld the benefit assessment, and the plaintiff has appealed from that judgment. The plaintiff maintains that the court erred in finding (1) that the assessment was authorized by General Statutes §7-249a[3]; (2) that General Statutes §7-249a is constitutional; (3) that the benefit assessment was properly conducted in accordance with General Statutes §7-249[4]; and, (4)

[1] General Statutes §7-250 provides in pertinent part: "Any person aggrieved by any assessment may appeal to the superior court for the judicial district wherein the property is located and shall bring any such appeal to a return day of said court not less than twelve nor more than thirty days after service thereof and such appeal shall be privileged in respect to its assignment for trial."

[2] The town of Stafford was also named as a defendant.

[3] General Statutes §7-249a provides: "Notwithstanding the provisions of section 7-249, any municipal water pollution control authority which constructs any sewerage system or portion thereof, with federal financial assistance under the provisions of the Federal Water Pollution Controls Act Amendments of 1972, P.L. 92-500, as from time to time amended, may, in lieu of or in addition to, levying benefit assessments in accordance with the provisions of said section 7-249, assess industrial users of the portion of the sewerage system constructed with federal financial assistance for the cost of construction of such portion to the extent such cost is attributable for the cost of construction of such portion to the extent such cost is attributable to the treatment of such industrial users' wastes. In determining such assessments, the municipal water pollution control authority may establish such classifications as may be approved by the administrator of the United States Environmental Protection Agency and the commissioner of environmental protection."

[4] "[General Statutes] Sec. 7-249. ASSESSMENT OF BENEFITS. At any time after a municipality, by its water control authority, has acquired or constructed, a sewerage system or portion thereof, the water pollution control authority may levy benefit assessments upon the lands and build-

that participation by a member of the WPCA in the determination of the assessment was not prohibited because of disqualification for financial interest.

There is no substantial dispute concerning the facts: In 1967, Stafford was ordered by the water resources commission (the predecessor of the department of environmental protection) to develop a pollution abatement system for the Willimantic River. A preliminary study was done in 1968 to determine the amount of sewage created by the town, including a study of the flow of wastewater created by various industries in the town. In reliance upon the figures presented in the preliminary study, a wastewater treatment plant with a capacity to process 2,000,000 gallons of sewage per day was designed.

The town applied for federal and state financial assistance for construction of the designed facility, and received approval from the federal government in September, 1970. Construction was completed in 1974 with the total cost of construction exceeding $2,500,000. The town's portion of the capital cost of construction was $383,251.78.

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ings in the municipality which, in its judgment, are especially benefited thereby, whether they abut on such sewerage system or not, and upon the owners of such land and buildings, according to such rule as the water pollution control authority adopts, subject to the right of appeal as hereinafter provided. Benefits to buildings or structures constructed or expanded after the initial assessment may be assessed as if the new or expanded buildings or structures had existed at the time of the initial assessment. Such benefits and benefits to anticipated development of land zoned for other than business, commercial or industrial purposes or land classified as farm land, forest land or open space land on the last completed grand list of the municipality in which such land is located, pursuant to the provisions of sections 12-107a to 12-107e, inclusive, shall not be assessed until such construction or expansion or development is approved or occurs. In case of a property so zoned or classified which exceeds by more than one hundred percent the size of the smallest lot permitted in the lowest density residential zone allowed under zoning regulations or, in the case of a town having no zoning regulations, a lot size of one acre in area and one hundred fifty feet in frontage, assessment of such excess land shall be deferred until such time as such excess land shall be built upon or a building permit issued therefor or until approval of a subdivision plan of such excess property by the planning commission having jurisdiction, whichever event occurs first at which time assessment may be made as

In 1979, the town was informed that in order to retain the federal grant given the town it would have to institute an industrial cost recovery plan to recover that portion of the town's share of capital cost attributable to the treatment of industrial wastewater.[5] A consultant was hired by the WPCA to prepare a report, and on June 3, 1980, the water pollution control authority voted to approve the report and levy assessments according to the recommendation contained in the report.

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provided herein. No lien securing payment shall be filed until the property is assessed. The sum of initial and subsequent assessments shall not exceed the special benefit accruing to the property. Such assessment may include a proportionate share of the cost of any part of the sewerage system, including the cost of preliminary studies and surveys, detailed working plans and specifications, acquiring necessary land or property or any interest therein, damage awards, construction costs, interest charges during construction, legal and other fees, or any other expense incidental to the completion of the work. The water pollution control authority may divide the total territory to be benefited by a sewerage system into districts and may levy assessments against the property benefited in each district separately. In assessing benefits against property in any district the water pollution control authority may add to the cost of the part of the sewerage system located in the district a proportionate share of the cost of any part of the sewerage system located outside the district but deemed by the water pollution control authority to be necessary or desirable for the operation of the part of the system within the district. In assessing benefits and apportioning the amount to be raised thereby among the properties benefited, the water pollution control authority may give consideration to the area, frontage, grand list valuation and to present or permitted use or classification of benefited properties and to any other relevant factors. The water pollution control authority may make reasonable allowances in the case of properties having a frontage on more than one street and whenever for any reason the particular situation of any property requires an allowance. Revenue from the assessment of benefits shall be used solely for the acquisition or construction of the sewerage system providing such benefits or for the payment of principal of and interest on bonds or notes issued to finance such acquisition or construction. No assessment shall be made against any property in excess of the special benefit to accrue to such property. The water pollution control authority shall place a caveat on the land records in each instance where assessment of benefits to anticipated development of land zoned for other than business, commercial or industrial purposes or land classified as farm land, forest land or open space land has been deferred."

[5]The federal requirement was a precondition to receiving the federal grant at the time it was approved. See Amendments to Regulation 601 Subpart B, 35 Fed. Reg. 10757 (1970) (codified at 18 C.F.R. §601.34 [1971]).

I

In its first claim of error, the plaintiff maintains that the method of assessment adopted by the WPCA was not authorized by General Statutes §7-249a, one of the statutes relied upon by the trial court in upholding the assessment.

When construing statutes we have frequently stated that where the language is clear and unambiguous the statute will be applied as its terms direct. See *Duguay v. Hopkins*, 191 Conn. 222, 228, 464 A.2d (1983); *Mobil Oil Corporation v. Westport*, 182 Conn. 554, 558, 438 A.2d 768 (1980); *In re Petition of State's Attorney, Cook County, Illinois*, 179 Conn. 102, 107, 425 A.2d 588 (1979).

General Statutes §7-249a is expressly limited in scope and application to the recovery of *federal* funds used for the cost of construction of sewerage systems "to the extent that such cost is attributable to the treatment of such industrial users' wastes." A benefit assessment is authorized only when the sewerage system was constructed "with federal financial assistance under the provisions of the Federal Water Pollution Controls Act Amendments of 1972, P.L. 92-500."[6] Neither requirement was fulfilled in this case. The assessment formula adopted by the WPCA recovers the local funds used for constructing the sewerage system, not the federal funds. Furthermore, the sewerage system was constructed with federal financial assistance under the Federal Water Pollution Control Act of 1948, 33 U.S.C.A. §§466 through 466n (1970 Sup.), not with funds contributed under the 1972 act.[7]

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[6] See footnote 3, supra, for the full text of General Statutes §7-249a.

[7] We disagree with the WPCA's contention that, in referring to the 1972 act, the legislature was only employing the popular name of the act and not applying any substantive restrictions. The 1972 act effected substantial changes in the law concerning federal funding for wastewater treatment plants. One of the more important changes was the requirement that grantees of federal funds assure the federal agency that an equitable system for recovering the federal share of costs attributable to the treatment of industrial waste would be instituted. See 33 U.S.C.A. §1284(b)(1)(B) (1977 Sup.). Congress made clear, however, in the savings provision of the 1972 act that all grants given prior to the effective date of

The trial court erred, therefore, in finding that the WPCA's method of assessment was authorized by General Statutes §7-249a.[8]

II

The judgment upholding the assessment may, nonetheless, be affirmed if the assessment was proper, as the trial court found, under General Statutes §7-249. The plaintiff claims that the assessment was not proper under General Statutes §7-249 because the WPCA relied upon construction cost as part of the method for formulating the assessment; the WPCA limited the assessment to industries discharging more than 25,000 gallons of waste per day in 1968; and the assessment exceeds the special benefit conferred. In order to address each claim, we must first set out the formula adopted by the WPCA.

After being informed that it was required to devise an equitable method of cost recovery, the town contracted with a consultant to make a study and submit an equitable method of cost recovery to the WPCA. The consultant's report, following federal guidelines published by the environmental protection agency[9] and binding upon Stafford when it accepted federal financial aid,[10] listed all users of the treatment facility who, in 1968, were discharging more than 25,000 gallons of wastewater per day into the Willimantic

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the 1972 act would be exempt from the 1972 act's requirements. See The Federal Water Pollution Controls Act Amendments of 1972, P.L. 92-500, §§4(a) through 4(c), 86 Stat. 816, 896-97 (1972).

[8] Our decision on this issue makes it unnecessary to reach the question concerning the statute's constitutionality as applied to the plaintiff. See *Bruno v. Civil Service Commission*, 192 Conn. 335, 352, A2d (1984) (*Shea, J.*, concurring).

[9] See Office of Water Program, U.S. Environmental Protection Agency, Federal Guidelines, Equitable Recovery of Industrial Waste Treatment Costs. (1971).

[10] When the town's application for federal aid for construction costs was accepted in September, 1970, the federal regulations concerning equitable methods of cost recovery of local shares as a precondition to federal aid under the 1948 act were in effect. See footnote 5, supra.

River.[11] Of the four major polluters, the plaintiff's plant contributed the largest daily flow in 1968, 900,000 gallons of wastewater per day.

The report then established the fractional share of the treatment plant's total capacity intended to be used by each of the four users contributing more than 25,000 gallons of waste per day. The town's share of capital costs was then multiplied by each users' fractional share of the waste treatment plant's total capacity in order to determine the amount of the assessment.[12] The WPCA adopted the formula and figures submitted and assessed each industrial user accordingly.

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[11] The consultant relied upon the 1968 water flow charted in the preliminary study prepared for the town because the waste treatment facility had been designed with a total capacity large enough to handle the wastewater that was then being discharged. The figures are set out as follows:

"INDUSTRIAL FLOW CONTRIBUTIONS AND PERCENTAGES
1968 FLOW CONTRIBUTION-GPD

Industry Name	*Initial*	*Design*	*Percentage of STP Design Flow*
AMF-CUNO	54,250	54,250	2.7
Hale Mnfg. Co.	43,840	48,500	2.4
Stafford Printers	900,000	900,000	45.0
Warren Woolen Co.	208,200	210,000	10.5
TOTALS	1,206,290	1,212,750	60.6"

By 1980, the plaintiff had ceased doing business in Stafford and was no longer contributing wastewater to the treatment plant.

[12] The formula and final computations are as follows:

"COMPUTATION OF ICR ESTIMATED CHARGES

Industry	*Computation*	*Est. Charges*
AMF-CUNO	54,250 GPD / 2,000,000 GPD x $383,251.78	$ 10,395.70
Hale Mfg. Co.	48,500 GPD / 2,000,000 GPD x $383,251.78	$ 9,293.86
Stafford Printers	900,000 GPD / 2,000,000 GPD x $383,251.78	$172,463.30
Warren Woolen Co.	210,000 GPD / 2,000,000 GPD x $383,251.78	$ 40,241.44
TOTAL INDUSTRIAL SHARE		$232,394.30
ESTIMATED NET TOWN SHARE		$150,857.48"

The estimated net town share was recovered out of general revenues.

The plaintiff claims that the method of assessment adopted by the WPCA was improper because it was based upon construction costs and applied only to industrial users who were contributing more than 25,000 gallons of wastewater to the river in 1968.

General Statutes §7-249 contains broad provisions, permitting the WPCA to "give consideration to the area, frontage, grand list valuation and to present or permitted use or classification of benefited properties and to any other relevant factors." In this case, the WPCA relied upon the fractional share of the waste treatment plant's total capacity set aside for the individual industrial users' needs. Certainly, each industry's need to have available a method of treating its quantity of waste is a "relevant factor" when determining the special benefit conferred by construction of a waste treatment facility.

The WPCA limited the assessment to polluters contributing more than 25,000 gallons of wastewater per day to the river. We recently upheld a similar formula for determining who would be assessed. In *Mobil Oil Corporation v. Westport*, 182 Conn. 554, 438 A.2d 768 (1980), the town determined that all properties within a radius of 500 feet were benefited by the construction of a parking lot. We held that where the formula adopted bears a reasonable relationship to the benefits conferred the method of assessment would be upheld. See *Mobil Oil Corporation v. Westport*, supra, 561. We find nothing unreasonable about the formula adopted here by the WPCA.

Nor was it improper for the WPCA to rely upon the construction costs as a multiplier for determining the amount of the assessment. General Statutes §7-249 permits the WPCA to "include a proportionate share of the cost of any part of the sewerage system, including . . . construction costs, interest charges during construction . . . or any other expense incidental to the completion of the work." The method for determining the amount of the assessment adopted by the

WPCA is quite similar to the "front-foot rule" — a method of assessing approved by this court even though the dollar figure is derived by dividing the cost of construction "by the total frontage of land in the city upon the streets in which sewers might be constructed." *Bassett v. New Haven*, 76 Conn. 70, 73, 55 A. 579 (1903); see also *Katz v. West Hartford*, 191 Conn. 594, 603, 469 A.2d 410 (1983). We agree with the trial court that the WPCA adopted a permissible method for assessing special benefits.

B

The plaintiff also claims that the defendants did not comply with §7-249 because the assessment exceeds the special benefit. The trial court found, however, that the assessment did not exceed the benefit.

Whether an assessment exceeds the special benefit is a question of fact subject to the clearly erroneous standard of review: "whether the facts set out in the memorandum of decision are supported by the evidence. . . ." *Pandolphe's Auto Parts, Inc. v. Manchester*, 181 Conn. 217, 221, 435 A.2d 24 (1980). The trial court's determination is amply supported by the evidence presented at trial.

An expert witness testifying on behalf of the defendants, who had visited the property several times, testified that the plaintiff's property was increased in value by $172,500 due to the construction of the waste treatment plant and its ability to treat the 900,000 gallons of waste created by the plaintiff's plant. He introduced a chart showing comparable sales and further testified that the "highest and best use" for the building was textile manufacturing. Although the plaintiff introduced conflicting testimony, the trial court was not obligated to accept the plaintiff's version of the facts.[13] The resolution of conflicting testimony is within the exclusive province of the trial court. *Gallicchio Bros., Inc. v. C & S Oil Co.*, 191 Conn. 104, 109, 463 A.2d 600 (1983).

[13] The two expert witnesses who testified for the plaintiff had visited the plaintiff's place of business in Stafford only once. They testified that the highest and best use was for light manufacturing and warehousing.

III

The plaintiff's final claim of error concerns William Sorenson's participation as a member of the WPCA in the vote adopting the method of assessment recommended by the consultant.

Sorenson was a member of the WPCA when it voted in 1980 to approve the assessment. At that same time he was also an officer of Warren Woolen Company, one of the industrial users assessed by the defendants. The plaintiff maintains that, because of Sorenson's financial interest in Warren Woolen, he should have disqualified himself and that his failure to do so deprived the plaintiff of a fair and impartial tribunal for determining assessments.

"Public office is a trust conferred by public authority for a public purpose. *State ex rel. Stage v. Mackie*, 82 Conn. 398, 401, 74 A. 759 [1909]. His status forbids the public officer from placing himself in a position where his private interest conflicts with his public duty. The good faith of the official is of no moment because it is the policy of the law to keep him so far from temptation as to insure the exercise of unselfish public interest. He must not be permitted to place himself in a position in which personal interest may conflict with his public duty." *Low v. Madison*, 135 Conn. 1, 8, 60 A.2d 774 (1948). "'The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case.' *Anderson v. Zoning Commission*, 157 Conn. 285, 290-91, 253 A.2d 16 (1968); see *Housing Authority v. Dorsey*, 164 Conn. 247, 252, 320 A.2d 820, cert. denied, 414 U.S. 1043, 94 S. Ct. 548, 38 L. Ed. 2d 335 (1973); *Lake Garda Improvement Assn. v. Town Plan & Zoning Commission*, 151 Conn. 476, 480, 199 A.2d 162 (1964); *Mills v. Town Plan & Zoning Commission*, 144 Conn. 493, 134 A.2d 250 (1957); 63 Am. Jur. 2d, Public Officers and Employees §281. The test is not whether personal interest does, in fact, conflict, but whether it reasonably might conflict. *Josephson v. Planning Board*, 151 Conn. 489, 493-95, 199 A.2d 690 (1964)." *Thorne v. Zoning Commission*, 178 Conn. 198, 205, 423 A.2d 861 (1979).

At trial and on appeal, the plaintiff maintained that if the WPCA had chosen 1974 or 1980 as the year for determining the flow, the plaintiff's daily flow would have been less and Warren Woolen would then have had to pay a larger assessment, thus adversely affecting Sorenson's financial interest. The plaintiff's claim, however, is not borne out by the facts. As stated in part II of this opinion, each industry was assessed according to its individual fractional share of the waste treatment plant's total capacity. An increase in the plaintiff's daily flow used as a basis for its assessment would not change Warren Woolen's assessment which was based upon the relationship of its own daily flow to the total capacity of the plant.[14]

The plaintiff also claims that if Warren Woolen's daily flow was greater in 1974 or 1980, then its assessment would have been increased, thus resulting in a conflict with Sorenson's financial interest. The plaintiff did not, however, present any evidence to demonstrate that Warren Woolen's daily waste flow had increased since 1968 above the amount used in calculating its assessment. In fact, the plaintiff's allegations amount to mere speculation.

We recognize and reaffirm the principle first declared in *Low v. Madison*, supra, that the appearance of impropriety created by a public official's participation in a matter in which he has a pecuniary or personal interest is alone sufficient to require disqualification. This prophylactic rule serves the salutary purposes of promoting public confidence in the fairness of the decision-making process and preventing the public official from placing himself in a position where he might be tempted to breach the public trust

[14] In this regard, we note that Warren Woolen's daily discharge in 1968 was 208,200 gallons of waste per day. The treatment plant was designed, however, to handle 210,000 gallons of waste from the Warren Woolen's plant. See footnote 11, supra. Warren Woolen's assessment was, therefore, based upon the higher figure because that figure represented the actual fractional share of the waste treatment plant's total capacity set aside for Warren Woolen's waste. See footnote 12, supra.

bestowed upon him.[15] See *Thorne v. Zoning Commission*, supra, 203-205, and cases cited therein. "Whether a particular interest justifies disqualification is necessarily a factual question, for not every interest, no matter how remote and infinitesimal, may be said to possess the likely capacity to tempt the public official to depart from his sworn duty." 4 McQuillin, Municipal Corporations (3d Ed. Rev. 1979) §13.35; *Armstrong v. Zoning Board of Appeals*, 158 Conn. 158, 171-72, 257 A.2d 799 (1969); *Anderson v. Zoning Commission*, 157 Conn. 285, 291, 253 A.2d 16 (1968); see also *North Hempstead v. North Hills*, 38 N.Y.2d 334, 379 N.Y.S.2d 792, 342 N.E.2d 566 (1975); *West Slope Community Council v. Tacoma*, 18 Wash. App. 328, 569 P.2d 1183 (1977); Anderson, American Law of Zoning §4.18 (2d Ed. 1976); annot., 10 A.L.R. 3d 694 (1966). Therefore, our prior cases have implicitly required a litigant to show the existence of a fact or set of facts that might reasonably be viewed as having an improper influence on the public official. For example, we have held that a zoning commissioner was disqualified from participating in zoning matters where the matter may have advanced the personal interests of the commissioner's relatives; *Thorne v. Zoning Commission*, supra; or where the matter may have advanced a pecuniary interest of an association of which the commissioner was president. *Daly v. Town Plan & Zoning Commission*, 150 Conn. 495, 191 A.2d 250 (1963). We have also held that a zoning commissioner was not similarly disqualified merely because he was also a member of an association opposed to an applicant's request for a special permit; *Holt-Lock, Inc. v. Zoning & Planning Commission*, 161 Conn. 182, 286 A.2d 299 (1971); or because the law firm representing the applicant had in the past represented a corporation in which the commissioner owned a substantial amount of

[15] The requirement that a public official disqualify himself from participating in the consideration of a matter in which he has either a pecuniary or personal interest necessarily implicates a collateral duty to apprise himself of all facts and circumstances surrounding the matter which might lead a reasonable disinterested person to question the public official's impartiality. Accord, Code of Judicial Conduct, Canon 3C (2).

stock. *Anderson v. Zoning Commission*, supra; see also *Armstrong v. Zoning Board of Appeals*, supra; *Furtney v. Zoning Commission*, 159 Conn. 585, 589-94, 271 A.2d 319 (1970); cf. *State v. Jones*, 180 Conn. 443, 455, 429 A.2d 936 (1980) (entire state's attorney's office in a judicial district not disqualified where attorney-employee, who was disqualified, was forbidden from communicating with other attorneys about the case).

In the present case the plaintiff presented no evidence that Warren Woolen's daily wastewater flow has increased since 1968, the date chosen for determining the assessment. There is simply no evidence that Warren Woolen has been advantaged by the WPCA's decision to choose 1968 as the applicable date. It necessarily follows that Sorenson, an officer of Warren Woolen, had neither a personal nor pecuniary interest in the matter. If evidence had been produced which demonstrated that Warren Woolen could have benefited by the WPCA's selection of the assessment date, a different case would have been presented; but "we cannot say, in view of the manner in which this appeal has been presented to us, that as a matter of law the court reached an improper conclusion on the issue of [Sorenson's participation]." *Holt-Lock, Inc. v. Zoning & Planning Commission*, supra, 189.

There is no error.

In this opinion the other judges concurred.

NO. 024184
GAYNOR-STAFFORD
INDUSTRIES INC.
VS. : SUPERIOR COURT
STAFFORD WATER : JUDICIAL DISTRICT
POLLUTION AUTHORITY, OF TOLLAND
ET AL : NOVEMBER 22, 1982

MEMORANDUM OF DECISION

This is an appeal from the assessment of benefits by the Stafford Water Pollution Authority against the plaintiff owner of industrial premises located in the Town of Stafford.

The plaintiff contends that the assessment is invalid. Basically it claims that:

(1) General Statute §7-249a, providing for assessments of benefits upon individual users of federally financed sewerage facilities, is not applicable.

(2) General Statute §7-249a, if applicable, is unconstitutional.

(3) The assessment against the plaintiff was improperly calculated.

(4) The assessment against the plaintiff exceeds the special benefits to the premises involved.

(5) The participation of a member of the Authority having a financial interest in one of the other industries involved violated the plaintiff's right to a fair and impartial assessment.

A property owner who challenges a special assessment has the burden of proving its invalidity. *Citizens Association v. Bridgeport*, 84 Conn. 383, 387; 70 Am. Jur. 2d Special or Local Assessments §9.

The plaintiff is the owner of industrial premises in the Town of Stafford, occupied by Stafford Printers Division, which was used in its business of dyeing synthetic fabrics.

(see Exhibit A). In June of 1967, the Town was ordered by the State Resources Commission to abate water pollution by the construction of a sewage treatment plant providing for town-wide needs and providing capacity for the treatment of industrial waste. (Exhibit 1). Subsequently, an engineering firm was engaged to make a study and report covering the preliminary aspects of improvements and modifications to the existing sewerage systems. On March 1, 1968, the firm submitted its design report on water pollution facilities for the Town of Stafford. (Exhibit B). The Town applied for and accepted Federal assistance under 33 U.S.C. §466 et seq. The sewerage system was completed and placed in operation in December 1974.

On May 6, 1980, engineers submitted a report on a proposed system of equitable recovery of industrial waste treatment costs to the Town of Stafford. (Exhibit J). The report shows a total estimated cost of $2,506,659.98, with 50% Federal aid and 30% State aid. The Town's share of the construction costs was calculated to be $383,251.78. Based on estimates of industrial flow, four industries contributed 60% of the total, their attributable share of the cost being $232,394.30. The plaintiff's proposed share, based on a 900,000 gallon per day flow, was determined to be $172,463.30.

On June 3, 1980, a hearing was held on proposed assessments against industrial users. (Exhibit D). On June 6, 1980, the Stafford Water Pollution Authority gave notice of assessments levied against industrial users. (Exhibit F). The plaintiff's assessment was $172,463.30.

At a public hearing on June 6, 1980, the plaintiff objected to the assessment for the following reasons: (a) passage of time; (b) the assessment should have been made on current flow; (c) flow was not properly proportioned between residential and industrial users; (d) improper data on flow projection. (Exhibit D).

I

Upon the construction of a sewerage system by a municipality, assessments may be made against property benefited. General Statutes §7-249. Such assessments are generally sustained under the power of taxation, but benefits *must* be special to the property owner as distinguished from benefits to the general public as the result of the improvements, and may not exceed the special benefit to the property. *Windham Heights Association v. Windham*, 179 Conn. 229, 231; *Vail v. Sewer Commission*, 168 Conn. 514, 517; *McQullin, Municipal Corporations* (3rd ed.) 38.01.

General Statutes §7-249a, enacted in 1975, specifically authorizes, in lieu of or in addition to leveying benefits in accordance with General Statutes §7-249, the assessment of individual users for a portion of the cost of a sewerage system constructed with federal assistance to the extent that such costs is attributable to the treatment of industrial users waste.

The defendant claims that General Statutes §7-249a is not applicable because the sewerage system was completed before Section 7-249a became a law and because the federal financial assistance was not provided under the Federal Water Pollution Act Amendment of 1972. (see 33 U.S.C. §1284).

Generally if a municipal assessment is uniform upon all property receiving a special benefit, that is an advantage not enjoyed by the owners of other property, it may be sustained. *McQullin*, op cit. §38.01. Both General Statutes §7-249 and §7-249a are essentially authorizations for such special assessments. Section 7-249a is presumed to be applicable to assessments made after its effective date, although the improvements had already begun or had been completed. 70 Am. Jur. 2d Special and Local Assessments §12. The reference to the Federal Water Pollution Control Act Amendment of 1972, in the statute, obviously appears only for the purpose of identifying the federal legislation, not to limit the application of the Connecticut Statute. (see 33 U.S.C.A. §1251, historical note).

After the abatement order by the State Resources Commission, the industrial users had three options, (1) construction of an on-site treatment facility, (2) discontinuance of the manufacturing operation, or conversion of facilities for non-polluting uses, or (3) participation in municipal pollution control facilities. (Exhibit 5, Page 40). It was concluded that the latter option was the most practical and by far the most economical to the plaintiff at the time. The Town's attributable cost of treating industrial waste was assessed and distributed among industrial owners according to the projected use of each owner. (see Federal Guidelines, Equitable Recovery of Industrial Waste Treatment Costs, Exhibit K).

The defendants contend that General Statutes §7-249a, on its face is unconstitutional, is without merit. In this case the special assessment did not exceed the benefit conferred, and the total cost was equitably applied to all owners similarly situated. 70 Am. Jur. 2d Special or Local Assessments §10. It is significant that Federal Water Pollution and Control legislation has been found constitutional. 33 U.S.C.A. §1251, notes, decisions; *U.S. v. Ashland Oil & Transp. Co.*, C.A. Ky. 1974, 504 F. 2d 1317. The assessment imposed on the plaintiff's property was not palpably arbitrary. There was no discrimination in determining the benefits. (see Exhibit 5).

III

The plaintiff has not sustained the burden of showing that the assessment of benefits to the plaintiff was not properly calculated. The projected flow of 900,000 gallons a day from plaintiff's premises is not disputed. The waste flowage for each of the other industries was determined in the same manner as was the plaintiff's, and all the benefits assessed were levied upon the same basis and study. Mathematical accuracy in aportionment and calculations is not required. 40 Am. Jur. 2d Special or Local Assessments §242.

IV

The plaintiff's claim that the assessment against the plaintiff exceeds the special benefits to the premises involved is

equally without merit. The contention that the textile industry has suffered reverses and is now depressed, cannot be considered on the matter of past benefits conferred. The plaintiff's own witness confirmed that the problem of ailing textile operations in this area, similar to plaintiff's, did not begin until 1976, and that its plant was not listed for sale until 1979, all after the municipal project was put in operation. (Transcript P. 19). The beneficial cost of a project must depend on the design and capacity of the project and for current needs and usage, and not upon its actual future use. A special assessment is not the equivalent of a "taking" as argued by the plaintiff. Cf. *Schnier v. Commissioner*, 172 Conn. 427, 429; *Textron, Inc. v. Commissioner*, 176 Conn. 264, 268. (Both cases cited by the plaintiff).

V

The plaintiff finally claims that William Sorenson, a member of the authority was disqualified from voting on the assessments. It appears that Sorenson was interested in the Warren Woolen Company, one of the assessed industrial users, but did not influence directly or indirectly the amount of the plaintiff's assessment which was based entirely on a study of flowage from the various industrial premises and finally calculated by an engineer employed by the defendant.

It is a well established principle of common law that a municipal official may not use his official power to further his own interest. *Low v. Madison*, 135 Conn. 1, 5. This has been declared public policy in matters pertaining to zoning; General Statutes §§7-11 and 7-12; but there appears to be no statute pertaining to members of a water pollution authority.

When a claim of disqualification is made, "courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. They must, however, be mindful that to abrogate a municipal action on the basis that some remote and nebulous interest may be present would be to deprive

unjustifiably a municipality, in many important instances, of the services of its duly-elected or appointed officials. [Citation omitted]. The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case." *Anderson v. Zoning Commissions*, 157 Conn. 285, 291. A charge of bias must be supported by some evidence proving the probability of bias. *Obeda v. Board of Selectmen*, 180 Conn. 521, 524.

VI

The plaintiff has failed to sustain the burden of proof necessary to prevail upon its claims.

Judgment may enter for the defendants dismissing the appeal.

/s/ WILLIAM P. BARBER
William P. Barber, State Referee

NO. 11850
GAYNOR-STAFFORD
INDUSTRIES, INC.
VS. : SUPREME COURT
STAFFORD WATER : STATE OF
POLLUTION CONTROL CONNECTICUT
AUTHORITY, ET AL : MAY 30, 1984

ORDER

THE MOTION OF THE PLAINTIFF-APPELLANT, FILED APRIL 23, 1984, TO REARGUE, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED DENIED.

By the Court,

FRANCIS J. DRUMM, JR.
CHIEF CLERK

BY: /s/ M. T. ANGERS
Assistant Clerk-Appellate

NOTICE TO:
BYRNE, SCHECHTMAN & SLATER
EDWARD MUSKA, ESQ.
CLERK, SUPERIOR COURT, TOLLAND
REPORTER OF JUDICIAL DECISIONS
5-30-84

Sec. 7-249. Assessment of benefits. At any time after a municipality, by its water pollution control authority, has acquired or constructed, a sewerage system or portion thereof, the water pollution control authority may levy benefit assessments upon the lands and buildings in the municipality which, in its judgment, are especially benefited thereby, whether they abut on such sewerage system or not, and upon the owners of such land and buildings, according to such rule as the water pollution control authority adopts, subject to the right of appeal as hereinafter provided. Benefits to buildings or structures constructed or expanded after the initial assessment may be assessed as if the new or expanded buildings or structures had existed at the time of the initial assessment. Such benefits and benefits to anticipated development of land zoned for other than business, commercial or industrial purposes or land classified as farm land, forest land or open space land on the last completed grand list of the municipality in which such land is located, pursuant to the provisions of sections 12-107a to 12-107e, inclusive, shall not be assessed until such construction or expansion or development is approved or occurs. In case of a property so zoned or classified which exceeds by more than one hundred per cent the size of the smallest lot permitted in the lowest density residential zone allowed under zoning regulations or, in the case of a town having no zoning regulations, a lot size of one acre in area and one hundred fifty feet in frontage, assessment of such excess land shall be deferred until such time as such excess land shall be built upon or a building permit issued therfor or until approval of a subdivision plan of such excess property by the planning commission having jurisdiction, whichever event occurs first at which time assessment may be made as provided herein. No lien securing payment shall be filed until the property is assessed. The sum of initial and subsequent assessments shall not exceed the special benefit accruing to the property. Such assessment may include a

proportionate share of the cost of any part of the sewerage system, including the cost of preliminary studies and surveys, detailed working plans and specifications, acquiring necessary land or property or any interest therein, damage awards, construction costs, interest charges during construction, legal and other fees, or any other expense incidental to the completion of the work. The water pollution control authority may divide the total territory to be benefited by a sewerage system into districts and may levy assessments against the property benefited in each district separately. In assessing benefits against property in any district the water pollution control authority may add to the cost of the part of the sewerage system located in the district a proportionate share of the cost of any part of the sewerage system located outside the district but deemed by the water pollution control authority to be necessary or desirable for the operation of the part of the system within the district. In assessing benefits and apportioning the amount to be raised thereby among the properties benefited, the water pollution control authority may give consideration to the area, frontage, grand list valuation and to present or permitted use or classification of benefited properties and to any other relevant factors. The water pollution control authority may make reasonable allowances in the case of properties having a frontage on more than one street and whenever for any reason the particular situation of any property requires an allowance. Revenue from the assessment of benefits shall be used solely for the acquisition or construction of the sewerage system providing such benefits or for the payment of principal of and interest on bonds or notes issued to finance such acquisition or construction. No assessment shall be made against any property in excess of the special benefit to accrue to such property. The water pollution control authority shall place a caveat on the land records in each instance where assessment of benefits to anticipated development of land zoned for other than business, commercial or industrial purposes or land classified as farm land, forest land or open space land has been deferred.